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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 1039

J. I. CASE COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 57–62) is reported in 134 F. (2d) 70. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 9–28) are reported in 42 N. L. R. B. 85. The decisions of the Board in a prior representation case which forms a part of the record in this case are reported in 38 N. L. R. B. 522 and 39 N. L. R. B. 412.

JURISDICTION

The decree of the circuit court of appeals was entered March 17, 1943 (R. 62–64). The peti-

tion for writ of certiorari was filed on May 21, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1935, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the existence of agreements with individual employees exempts an employer from the duty to bargain collectively, under Sections 8 (5) and 9 (a) of the Act, with respect to terms of employment covered by such agreements, after a majority of the employees have selected a collective bargaining representative.

2. Whether the Board may order an employer to cease and desist from giving effect to individual contracts of employment, valid in origin, where the employer has utilized the contracts to interfere with his employees' rights under the Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*) are set forth in the Appendix, *infra*, pp. 13–15.

STATEMENT

After appropriate proceedings, in which all material facts were stipulated by the parties, the Board issued its findings of fact, conclusions of

law, and order (R. 9–28). The undisputed findings may be summarized as follows:

Since 1937, petitioner has annually offered, to the employees of its Rock Island plant, individual contracts fixing terms of employment for a year. These contracts contain, *inter alia*, the following provisions: Petitioner agrees to furnish employment as steadily as conditions permit and to pay a specified rate to the contracting employee, reserving, however, the right to determine new rates in the event the employee's job is changed. The employee agrees to accept the terms provided, and "to faithfully and honestly serve" petitioner for the term of the contract. At all times since 1937, about 75 percent of the employees were signatories to such contracts (R. 18–19).

On November 7, 1941, while the individual contracts executed August 1, 1941, were still in effect, the Union [1] petitioned the Board for certification as the exclusive bargaining representative of the production and maintenance employees in the plant (R. 18–19). On December 17, a hearing was held (R. 19). The same day, the Company sent a circular letter to its employees, informing them of the proceedings and recalling that in a previous proceeding the employees had rejected the Union's predecessor. The letter set forth the Company's assertion at the hearing that the indi-

[1] International Union, Automobile, Aircraft, and Agricultural Implement Workers of America, C. I. O.

vidual agreements were a bar to the designation of the Union as the exclusive bargaining representative of the employees (R. 19–20, 46–48).

The Board rejected this contention, and on February 13, 1942, held an election in which 352 votes were cast for the Union and 190 against. Accordingly, on March 3, it certified the Union as the exclusive bargaining representative of the employees in question, in respect to wages, hours, and other conditions of employment (39 N. L. R. B. 412).[2]

On March 7, the Union asked petitioner to bargain collectively with it as such exclusive representative. Petitioner refused. It expressed willingness, however, to bargain as to matters not covered by the individual agreements, and to bargain as to all matters, after the expiration of the agreements (R. 18). On March 19, petitioner, by individual letters, informed each of its employees of the position it had taken with respect to the Union's request (R. 20, 51–53).

Upon the foregoing facts the Board concluded (R. 23) that petitioner had failed to bargain collectively as required by the statute. It found further that the circular letters of December 17, 1941, and March 19, 1942, were intended by petitioner to divert the employees from further sup-

[2] Petitioner does not dispute the appropriateness of the bargaining unit fixed by the Board, or the Union's designation by a majority within that unit on and after February 13, 1942 (R. 32–33).

port of the Union and that petitioner had thereby utilized the contracts to interfere with and impede the self-organization of its employees. Upon these findings, the Board ordered petitioner (R. 25–27) to cease and desist from its unfair labor practices and to bargain collectively with the Union. It further directed petitioner to cease and desist from giving effect to the individual contracts or entering into similar contracts, and to notify the signatory employees that the contracts would not be enforced, that the said employees would not be expected to deal with petitioner individually by virtue of the contracts, and that the discontinuance of the contracts was without prejudice to the assertion of any legal rights the employees might have acquired thereunder.

On November 2, 1942, the Board filed its petition for enforcement in the court below (R. 53–56), and on February 26, 1943, the court handed down its opinion enforcing the Board's order, with a modification as to the scope of the cease-and-desist provision (R. 57–62). An appropriate decree was entered on March 17 (R. 62–64).

ARGUMENT

1. Petitioner does not deny that, except for the incidence of the individual agreements, it was obligated, at all times after February 13, 1942, to bargain with the Union as the exclusive representative of its employees, with respect to wages, hours, and other conditions of employment (R. 32–33). It contends, however, that by having en-

tered into agreements with individual employees, it had automatically exempted itself, for the duration of such agreements, from its duty to bargain collectively with respect to matters covered therein. This contention was properly rejected by the court below.

The duty to bargain collectively is imposed by the Act without limitation (Sections 8 (5) and 9 (a), *infra*, p. 15). The field of prescribed bargaining is therein defined as "rates of pay, wages, hours of employment, or other conditions of employment" and an unqualified and unconditional obligation is imposed upon the employer to bargain in that field, once a request is made by the statutory representative. The interpretation urged by petitioner, which reduces the scope of this obligation by the extent to which the employer can procure individual agreements beforehand, is precluded by the unambiguous terms of these provisions. It is moreover incompatible with the legislative findings set forth in Section 1 of the Act (*infra*, p. 13), in which Congress explicitly recognizes, as this Court has itself repeatedly declared, that the gross inequality of bargaining power between employers and individual employees makes it necessary for the latter to act in concert

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[3] *Holden* v. *Hardy*, 169 U. S. 366, 397; *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184, 209; *N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 33–34; *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 263–264. See also the legislative findings in the Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C., Sec. 102.

in order to obtain fair terms of employment. To accept petitioner's interpretation it is necessary to believe that Congress, while finding the individual employee incapable of reaching a fair bargain without collective action, nevertheless deemed him capable of bargaining away, at the threshold, his statutory right to collective bargaining. This is to construe the Act so as to permit the "practice and procedure of collective bargaining," which it seeks to encourage, to be obstructed by the very practices and procedures which it seeks to supplant (Section 1).

Contrary to petitioner's contention, the decisions below do not hold that the obligation which the Act placed upon the employer to bargain collectively automatically nullified the provisions of the individual-contracts upon the choice of a bargaining agent by the employees. The contracts remained in effect until superseded by a collective agreement or cancelled as a result of an order of the Board. But the employer was required to deal in good faith with the newly chosen representative as the authorized agent of the employees, and to bargain with the representative with respect to changing the agreement if requested.[1] If the employer and the representative agreed upon different

[1] It should be noted that the existence of even a collective agreement does not relieve an employer from the obligation to bargain collectively concerning matters covered in the agreement. *National Labor Relations Board* v. *Sands Mfg. Co.*, 306 U. S. 332, 342; *Rapid Roller Co.* v. *National Labor Relations Board*, 126 F. (2d) 452, 459 (C. C. A. 7), cert. de-

terms of employment, they could modify or supersede the earlier individual agreements, just as any two contracting parties have a right to supplement, modify, or cancel an earlier agreement. The power of the negotiators to supersede agreements made by the employees individually is obviously not lessened by the fact that the employees are acting through an agent or representative rather than in person. It is thus apparent that the existence of preexisting contracts between petitioner and individual employees did not excuse petitioner from bargaining collectively with the representative selected by the employees and certified by the Board.

This conclusion is compelled by *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, in which this Court held that employers may not include in individual contracts with employees clauses imposing restraints upon "the employees' rights to organize and bargain collectively" (309 U. S., at 360).[5] In the instant case

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nied, 317 U. S. 650; *National Labor Relations Board* v. *Newark Morning Ledger Co.*, 120 F. (2d) 262, 267 (C. C. A. 3), cert. denied, 314 U. S. 693. It is plainly idle to argue that an individual bargain relieves an employer, for the period of the agreement, of the duty to bargain collectively, when not even a collective bargain with the statutory representative can do so.

[5] Other provisions in individual contracts held to foreclose or limit future collective bargaining were similarly held invalid in *National Labor Relations Board* v. *Superior Tanning Co.*, 117 F. (2d) 881, 891–892 (C. C. A. 7), cert. denied, 313 U. S. 559; *National Labor Relations Board* v. *Stone*, 117 F. (2d) 752, 756 (C. C. A. 7), cert. denied, 317 U. S. 649; *National Labor Relations Board* v. *Vincennes Steel Corp.*, 117 F. (2d) 169, 172–173 (C. C. A. 7). Petitioner seeks to

petitioner is seeking to give contracts which contained no such provision the very effect which the *National Licorice* case held could not be provided for expressly.

Petitioner's position finds no support in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 41–45, which petitioner claims to be in conflict with the decision below. Although that case indicated that individual contracts may in some circumstances be permissible, it did not hold that an employer is justified in refusing to bargain with the representative of the employees because of the existence of such contracts. Cf. *National Licorice Co.* v. *National Labor Relations Board, supra.* As the *Jones and Laughlin* opinion points out, the Act does not compel an agreement, and room is left for valid individual agreements on all matters on which the employer and the statutory representative cannot or do not agree.

2. The Board ordered petitioner to cease giving effect to the individual contracts or any "modification, continuation, extension, or renewal thereof" or from "entering into any similar form of contract * * * subsequent to the date" of its decision (R. 25). This provision of the order was not predicated upon any inherent illegality in the contracts themselves, but upon their use by

distinguish these cases (Pet. 8) on the ground that coercive influence was present in the execution of the contracts there involved. The point is, however, explicitly made in each of the opinions that the clauses restricting collective bargaining were in themselves illegal apart from any aspects of coercion.

petitioner as justification for its refusal to bargain collectively. The prohibition against entering into similar forms of contracts in the future, though broadly phrased, was intended only to preclude petitioner from deriving any benefits from the contracts thus utilized and from utilizing similar contracts under similar circumstances in the future, not to prevent petitioner from lawfully contracting with employees individually, under circumstances which negative any intent to interfere with their rights. That this was the construction which the Board placed upon its order was specifically stated in the Board's brief in the Circuit Court of Appeals.[6]

The Board concluded that petitioner "has utilized the individual contracts as a means of thwarting the rights of its employees under the Act" (R. 24), and ordered petitioner to refrain from enforcing the contracts in order to remove an obstacle to the full effectuation of the policies of the Act. The Board found (R. 23) that petitioner's circular communications to its employees, dated December 17, 1941, and March 19, 1942, were intended to divert the employees from continued support of the Union by advising them of its refusal to deal fully with the Union because of the existence of the agreements. The court below, we believe, properly upheld these findings.

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[6] See Board's Reply Brief, pp. 10–11.

[7] Petitioner objects to the provision in the order that discontinuance of the contracts be "without prejudice to the

Apart from the merits of the question, however, there is no occasion at the present time for a review of the provision of the Board's order requiring the cancellation of the contracts. Most of these contracts expired July 31, 1942 (R. 31), and we are advised that since the entry of the order, petitioner has, pursuant to an order of the National War Labor Board,[8] entered into a collective-bargaining agreement superseding the individual contracts. Although this would not render the point moot, it deprives the issue as to the validity of the Board's order requiring the abrogation of the original individual contracts of present practical importance.[9] Whatever question there might

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assertion of any legal rights the employee may have acquired under such contract" (R. 26). This Court, in *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, at 367, modified the Board's order in that case so as to add an identical provision, and the clause in question has been included in subsequent orders in deference to this Court's decision.

[8] National War Labor Board Case, No. 130, *In the Matter of J. I. Case Co.*, decided July 22, 1942, 10 Labor Relations Reporter 721. By letter of August 3, 1942, the company manifested its intention to comply with this order, for the duration of the war, although without prejudice to any of its legal rights.

[9] In *National Labor Relations Board* v. *Goodyear Tire and Rubber Co.*, No. 557, this Term, the Board dismissed its petition for certiorari in similar circumstances.

The statement by petitioner in its letter to the National War Labor Board that compliance with that Board's order was not to be deemed a waiver of petitioner's legal rights does not, of course, prevent this Court from taking into account the abrogation of the original individual agreements in determining whether the question as to whether the Board

have been as to the right of the employer with respect to the individual contracts still in effect at the time of the choice of a collective-bargaining representative, the Board undoubtedly has power, particularly in view of petitioner's use of the agreements as an excuse for avoiding collective bargaining, to prevent their extension or renewal or remaking after a collective-bargaining representative had been chosen by a majority of the employees and certified by the Board.

CONCLUSION

The decision below is correct and presents no conflict of decisions. The petition should, therefore, be denied.

Respectfully submitted.

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had power to order their cancellation is sufficiently important at the present time to warrant the granting of certiorari.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1937, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*), are as follows:

FINDINGS AND POLICY

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce * * *.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the rights to employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized

sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own chosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

REPRESENTATIVES AND ELECTIONS

SEC. 9 (a). Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

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